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## Jonas v. State Appellant's Brief Dckt. 40382

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SANDRA JONAS,	)	
	)	
Plaintiff-Appellant,	)	NO. 40382
	)	
v.	)	Jerome Co. CV-PC-2011-559
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF JEROME

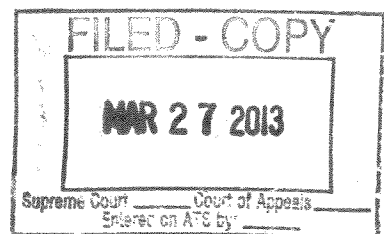
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## STATEMENT OF THE CASE

### Nature of the Case

Petitioner appeals from the summary dismissal of her successive petition for post conviction relief because the court dismissed the petition on different grounds than those provided in the notice of intent to dismiss.

### Statement of the Facts and Course of Proceedings

This case has a long and tortured history as explained by the district court in its Amended Order Dismissing Successive Petition (hereinafter Amended Order):

On November 4, 1999, Petitioner Sandra Jonas was sentenced to a unified term of life in prison with a fixed term of twenty-five years upon a plea of guilty to second degree murder in Jerome County Case No. CR-FE-1998-162. Thereafter, Petitioner filed a Rule 35 motion for a reduction of sentence, which was denied by the district court. Petitioner then appealed her conviction, sentence, and the denial of her Rule 35 motion. On December 15, 2000, the Court of Appeals affirmed the district court's conviction, sentence, and denial of the Rule 35 motion. Petitioner then filed a petition for rehearing and a petition for review with the Supreme Court. Both were denied, at which point the judgment became final. The Court of Appeals issued its Remittitur to the district court on April 18, 2001. Petitioner filed an I.C.R. 34 motion for a new trial on October 29, 2001 followed by an alternative motion for leave to withdraw her guilty plea. Two evidentiary hearings were held on Petitioner's motion to withdraw her plea. She filed her first petition for post-conviction relief on April 23, 2002 in Jerome County Case No. CV-2002 1536. On May 10, 2004, her motion to withdraw her guilty plea was denied because the evidence she presented did not amount to "manifest injustice." Petitioner appealed that decision and the Court of Appeals affirmed the district court, although on different grounds, on June 30, 2006. Petitioner filed a petition for review, which was denied, and a remittitur was issued on April 19, 2006. Then, on August 26, 2008, following a hearing, the district court issued its Order Dismissing Petition for Post-Conviction Relief in Jerome County Case No. CV-2002-1536.

Petitioner appealed that dismissal on the grounds that the district court erred by summarily dismissing her petition because she raised genuine issues of material fact that she received ineffective assistance of counsel and that her guilty plea was involuntary (and that the plea was involuntary without first being afforded notice). In an unpublished opinion dated April 14, 2010, the Court of Appeals affirmed the district court's summary dismissal on the grounds that Petitioner's petition and supporting materials "contained only bare and conclusory allegations which the district court was not required to accept." A remittitur was issued on June 29, 2010.

Amended Order, p. 1-2. (R. p. 121-122.)

As to the procedure of the instant post conviction, the district court explained as follows:

Finally, on May 12, 2011, Petitioner filed the current successive petitioner for post-conviction relief (Jerome County Case No. CV-2011-559). On May 2, 2012, following the Court's Notice of Intent to Dismiss, which granted Petitioner's request for court-appointed counsel, Petitioner filed her Amended Successive Petition for Post Conviction Relief, followed by a Verified Amended Successive Petition for Post Conviction Relief filed on June 12, 2012, with leave from the Court. Thereafter, on June 13, 2012, the State filed its Answer to Amended Successive Petition for Post Conviction Relief.

Petitioner's original successive petition stated eighteen grounds for post-conviction relief, many of which had already been raised in prior motions or were not actionable claims under the Uniform Post Conviction Procedure Act (UPCPA). The original petition was supported only by Petitioner's statement of facts. This Court addressed the original successive petition in its Notice of Intent to Dismiss, which is incorporated herein by reference. The Amended Petition condensed these claims into one multi part claim of ineffective assistance of post-conviction counsel, which will be addressed in this opinion.

Amended Order, p. 2-3 (footnote omitted). (R. p. 122-123.)

The court ultimately dismissed the amended successive petition. (R. p. 128.) As part of the order, the court also issued a Rule 54(b) certificate directing

that the order shall be a final judgment upon which an appeal can be taken. (R. p. 130.)

Petitioner timely appeals. (R. p. 132.)

### ISSUE

Whether the district court erred when it summarily denied the successive post conviction relief petition on grounds different than those contained in the notice of intent to dismiss.



## ARGUMENT

### THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED THE POST-CONVICTION RELIEF PETITION ON DIFFERENT GROUNDS THAN THOSE IN THE NOTICE OF INTENT TO DISMISS

#### A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id.*

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most favorable to

petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

*Strickland* set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

C. The Claims and the Court's Rulings

As explained in the Court's Notice of Intent to Summarily Dismiss Successive Petition for Post-Conviction Relief Pursuant to I.C. 19-4906, Order for Return of Property, and Order Granting Motion for a Court Appointed Attorney (hereinafter Notice of Intent to Summarily Dismiss), the pro se Petitioner raised

what the court characterized as 18 grounds for post-conviction relief, which follow:

- 1) Self-defense/actual innocence;
- 2) Ineffective assistance of counsel/conspiracy;
- 3) No investigator/investigation for defense;
- 4) No evidence against defendant;
- 5) Challenge of conviction, sentence, etc.;
- 6) US and state constitutional violations (see No.s 8 and 9 below);
- 7) Prosecutorial and appointed defense attorney (see No. 2 above) misconduct;
- 8) Excessive unduly harsh sentence;
- 9) Illegal searches and seizures;
- 10) Perjury;
- 11) Miscarriage of justice;
- 12) Wanton and affirmative misconduct;
- 13) Bias/prejudice of state and defense attorneys;
- 14) Conspiracy of state and defense attorneys based on religion and gender;
- 15) Duress by prosecution, mediator, and defense attorneys;
- 16) Actual substantial prejudice from delay of 2 filed petitions;
- 17) Prejudice through denial of case records;
- 18) Anything remembered after the fact.

Notice of Intent to Summarily Dismiss, p. 1-2. (R. p. 30-31.)

The grounds for the court's intended summary dismissal are as follows:

. . . . Notably, the petitioner's application is supported only by a nine-page statement of facts. This does not amount to admissible evidence sufficient to make a prima facie case as to each element of Petitioner's numerous claims. In fact, Petitioner appears to have listed an exceptionally wide array of claims, some of which she has asserted in prior petitions and motions, supported only by her description of the facts as she sees them.

Thus, Petitioner does not present adequate grounds upon which to base a successive application for post-conviction relief. Petitioner is hereby given twenty (20) days to reply to this proposed dismissal. I.C. § 19-4906(6).

Notice of Intent to Summarily Dismiss, p. 2 (footnote omitted). (R. p. 31.)

The court did appoint counsel, ruling as follows:

In the current petition, this Court has noted that the asserted claims are unsupported by admissible evidence sufficient to establish a prima facie showing as to each element of her claims. This is due and owing, in part, to the fact that she has essentially alleged every potential ground for post-conviction relief available, and then some. Additionally, Petitioner has been in prison since her sentencing in 1999, and it is therefore presumed that she has inadequate funds with which to hire her own attorney. In an effort to provide Petitioner with adequate resources to narrow her petition and present a potentially valid claim, this Court will grant her motion for appointment of counsel.

Notice of Intent to Summarily Dismiss, p. 4 (emphasis added). (R. p. 33.)

Counsel was appointed, who did file an amended successive petition for post conviction relief. (R. p. 42-48.) Counsel also filed a motion requesting additional time in order to have the Petitioner verify the petition, and the court granted the motion. (R. p. 72, 76.) Counsel then filed what was entitled Verified Amended Successive Petition for Post Conviction Relief (hereinafter Verified Amended Successive Petition).<sup>1</sup> (R. p. 78-85.) As will be shown below, the court noted that the petition wasn't actually verified, but it treated it as if it was.

Petitioner specifically alleged as follows in the Verified Amended Successive Petition:

- a. In Dunlap's filed Original Amended Petition, Dunlap failed to verify the Original Amended Petition as required by Idaho Code § 19-4902(a).
- b. In the Original Amended Petition, Dunlap failed to assert any specific facts to support Petitioner's allegations of her underlying ineffective assistance of counsel and merely offered bare and conclusory assertions of the same.

---

<sup>1</sup> Appellant notes that at first glance the instant record appears confusing because the amended successive petition and verified amended successive petition contain as attachments, the initial amended petition for post conviction relief and the order dismissing it.

c. Specifically, Dunlap failed to assert the following facts as to Petitioner's underlying criminal case, which Petitioner hereby states and asserts are true:

i. That on or about October 25, 1998, Petitioner was in her ex-husband's house. At that time, her intention was to remove some items which were hers from the house. Petitioner had placed a .22 pistol, which belonged to Petitioner, on a kitchen counter in the upstairs kitchen area of the house.

ii. That some time after arriving at the house, Petitioner's ex-husband's girlfriend, Mata Jones ("Jones"), presented at the house. Petitioner followed Jones downstairs in the house to inquire as to why Jones was present there.

iii. Upon entering the downstairs area of the house, Jones began to yell at Petitioner. As the Jones's yelling escalated, Jones hit petitioner with a telephone which was in Jones' hand. The impact caused a laceration on Petitioner's hand, and Petitioner's hand began to bleed.

iv. Following the physical altercation with the phone, Jones went back upstairs in the house. Petitioner then hung up the phone with some force, as Jones had left it off the hook. Petitioner then proceeded upstairs to see what Jones was doing.

v. Upon going upstairs, Petitioner could not locate Jones, and Petitioner began to search for Jones. After some time, Petitioner did not find Jones, and Petitioner returned to the kitchen area of the house. At that time, Jones presented behind the Petitioner.

vi. Jones began once again to yell at Jonas, which yelling began to be more escalated. During Jones yelling, Jones told Petitioner that she was going to marry Petitioner's ex-husband and that all of Petitioner's prior possessions were going to soon belong to Jones. Jones said, "Miles is mine, I've been fucking him for years." Jones further stated that she would "own" Petitioner's children and could do with the children as she pleased. Also during the argument, Jones asserted that she was going to "do [Petitioner and Petitioner's] children in".

vii. While Jones yelled at Petitioner, Jones regularly turned her gaze toward Petitioner's .22 pistol that was located on the countertop next to the kitchen sink. Jones was physically closer to the pistol than Petitioner.

viii. At one point, Jones looked at the pistol, and Petitioner stated, "Don't even think about it." At that time, Jones moved quickly for the pistol, and Petitioner followed.

ix. Jones grabbed the pistol and began to point it towards Petitioner. Petitioner was fearful for her life and the life of her daughter who was downstairs because Petitioner believed that the .22 bullet could go through the floor and hit her daughter.

x. Petitioner grabbed Jones's hand, which held the pistol, as Jones pointed the pistol towards Petitioner. At that time, the pistol discharged, and the bullet hit Jones in the face.

xi. Jones's body then fell forward, and her head landed near Petitioner's feet. Petitioner saw that Jones was still breathing as Jones made a sound with her breath. After a second of collecting herself after the first shot, Petitioner proceeded to Jones's side to investigate her breathing. As Petitioner proceeded to bend down toward Jones's body, the pistol, which was loosely contained in Petitioner's hand, accidentally discharged for a second time after Petitioner's hand hit Petitioner's knee, which caused a .22 bullet to hit Jones.

d. Also, specifically, Dunlap failed to assert the following facts as to Petitioner's underlying criminal representation of Randy Stoker and Marilyn Paul, which Petitioner hereby asserts are true:

i. Neither of Petitioner's counsel ever investigated the aforementioned facts, despite the fact that an investigator was approved by the Court. Specifically, Petitioner believes that such investigation would have shown 1) bullet projections consistent with Petitioner's above recited facts of how the pistol was shot on both of the two discharges; 2) blood from Petitioner in the kitchen and in the bed of Petitioner's daughter's pickup, consistent with Petitioner's assertions that Jones initiated the first physical altercation by hitting Petitioner with a phone; and 3) that Jones had a quarrelsome, violent, dangerous and/or manipulative background, consistent with Petitioner's assertion that Jones struck Petitioner, threatened Petitioner's life and Petitioner's children's lives, and Jones made the initial move toward the pistol during the argument in the kitchen.

ii. In the event that an investigation was conducted in Petitioner's underlying criminal case, Petitioner asserts that Dunlap failed to argue that Petitioner's underlying criminal counsel failed to

review the information obtained by any investigator. Petitioner specifically alleges hereby that neither Stoker nor Paul ever reviewed any information obtained by an investigator with her.

iii. Neither of Petitioner's underlying counsel advised Petitioner of a potential self-defense or defense of others defense. Specifically, Petitioner was never advised of the burden of proof on a self-defense or defense of other defense in her alleged crime. More specifically, Petitioner was never advised that at trial, the burden would be on the prosecution to prove beyond a reasonable doubt that the homicide of Jones was not justifiable and that if a jury found that there is a reasonable doubt whether the homicide of Jones was justifiable, the jury would be instructed that it must find the defendant not guilty. In fact, Petitioner was led to believe that she bore the burden of proving a self-defense or defense of others defense in her case by her counsel.

e. Additionally, Dunlap failed to investigate and challenge the facts as contained in the Pre-Sentence Investigation Report in this case, as they contradict with the facts as contained herein. Specifically, Dunlap should have challenged the following facts, which neither Stoker nor Paul investigated or argued at the Petitioner's sentencing: 1) that Petitioner's blood was at the scene in the kitchen and in Petitioner's daughter's truck; 2) that Petitioner did not have violent tendencies; and 3) that Petitioner never talked with any outside party about the facts of the case, including but not limited to the facts contained herein.

f. Dunlap failed to communicate with Petitioner to discover Petitioner's desire to raise the foregoing facts and legal arguments in her Original Post-Conviction Petition. As such, Dunlap's Original Amended Petition summarily asserted that Petitioner "was not being properly advised/informed of the *procedures* taking place in her case" (emphasis added).

g. Had Dunlap rendered effective assistance as Petitioner's counsel, by completing the acts as stated above, Dunlap would have been able to effectively argue that Petitioner's counsel, Randy Stoker and Marilyn Paul, in her underlying criminal case were ineffective assistance to Petitioner.

h. Had Stoker and Paul provided effective assistance as counsel to Petitioner, Petitioner would not have entered a guilty plea in this matter and would have proceeded successfully on a self defense or defense of others defense, after adequate investigation made on

the underlying facts to support the facts as recited and contained herein.

Verified Amended Successive Petition, p. 3-7. (R. p. 80-84.)

The state filed an answer to the Verified Amended Successive Petition which admitted some allegations and denied others. More to the point, it raised the following affirmative defenses:

AFFIRMATIVE DEFENSE ONE

Petitioner's Successive Petition for Post-Conviction Relief is untimely. I. C. § 19-4902.

AFFIRMATIVE DEFENSE TWO

Petitioner's Successive Petition for Post-Conviction Relief asserts issues that were effectively waived by the Petitioner's plea of guilty. I.C. § 19-4908

AFFIRMATIVE DEFENSE THREE

Petitioner's Successive Petition for Post-Conviction Relief contains bare and conclusory allegations unsubstantiated by affidavits, records, or other admissible evidence, and therefore fails to raise a genuine issue of material fact. Idaho Code Sections 19-4902(a), 19-4903, and 19-4906.

AFFIRMATIVE DEFENSE FOUR

Petitioner's Successive Petition for Post-Conviction Relief are clearly disproved by the record; and under such circumstances, Petitioner's allegations are insufficient for the granting of relief.

AFFIRMATIVE DEFENSE FIVE

Petitioner's Successive Petition for Post-Conviction Relief could and should have been raised on direct appeal. As a result, such allegations are forfeited and may not be considered in post-conviction proceedings. Idaho Code § 19-4901(b).

AFFIRMATIVE DEFENSE SIX

Petitioner's claim of ineffective assistance of counsel is unsubstantiated by facts that support her claim that her counsel's conduct fell below an objective standard of reasonableness and that Petitioner was prejudiced by his attorney's deficient performance. Wherefore Petitioner's claim fails for sufficiency.

Answer, p. 1-2. (R. p. 108-109.)



The court then issued its order dismissing successive petition for post conviction relief. (R. p. 112-119.) Shortly thereafter it issued its amended order dismissing successive petition for post conviction relief. (R. p. 121-131.) It began by repeating its recitation of the procedural history from its notice of intent to dismiss. (R. p. 121-122.) The court continued by explaining:

Finally, on May 12, 2011, Petitioner filed the current successive petitioner for post-conviction relief (Jerome County Case No. CV-2011-559). On May 2, 2012, following the Court's Notice of Intent to Dismiss, which granted Petitioner's request for court-appointed counsel, Petitioner filed her Amended Successive Petition for Post Conviction Relief, followed by a Verified Amended Successive Petition for Post Conviction Relief<sup>1</sup> filed on June 12, 2012, with

[Footnote]

1 Aside from the verification by Petitioner and some amended language, specifically roman iv. on page 4, the Verified Petition is the same as the original Amended Petition filed on May 2, 2012. Additionally, Petitioner's verification signature was not notarized. This is an error that the Court will disregard for purposes of this Order, which addresses the merits of Petitioner's claims.

leave from the Court. Thereafter, on June 13, 2012, the State filed its Answer to Amended Successive Petition for Post Conviction Relief.

Petitioner's original successive petition stated eighteen grounds for post-conviction relief, many of which had already been raised in prior motions or were not actionable claims under the Uniform Post Conviction Procedure Act (UPCPA). The original petition was supported only by Petitioner's statement of facts. This Court addressed the original successive petition in its Notice of Intent to Dismiss, which is incorporated herein by reference. The Amended Petition condensed these claims into one multi part claim of ineffective assistance of post-conviction counsel, which will be addressed in this opinion.

Amended Order, p. 2-3. (R. p. 122-123.)

After explaining the ordinary standards for a post conviction relief petition alleging ineffective assistance of counsel, the court continued as follows:

On the other hand, there is no constitutionally protected right to the effective assistance of counsel in post-conviction relief proceedings. *Follinus v. State*, 127 Idaho 897, 902 (Ct.App. 1995). Thus, such an allegation, in and of itself, is not among the permissible grounds for post-conviction relief. See *Griffin v. State*, 142 Idaho 438, 441 (Ct.App. 2006); *Wolfe v. State*, 113 Idaho 337, 339 (Ct.App. 1987). Ineffective assistance of prior post-conviction counsel may, however, provide sufficient reason for permitting newly-asserted allegations or allegations inadequately raised in the initial petition to be raised in a subsequent post-conviction petition. *Schwartz v. State*, 145 Idaho 186, 189 (Ct.App. 2008); See also *Palmer v. Dermitt*, 102 Idaho 591, 596 (1981); *Hernandez v. State*, 133 Idaho 794, 798 (1999). Failing to provide a post-conviction petitioner with a meaningful opportunity to have his or her claims presented may be violative of due process. *Schwartz*, 145 Idaho at 189; *Hernandez*, 133 Idaho at 799; See also *Abbott v. State*, 129 Idaho 381, 385 (Ct.App. 1996); *Mellinger v. State*, 113 Idaho 31, 35 (Ct.App. 1987).

Under I.C. § 19-4908, summary dismissal of a successive petition for post-conviction relief on the basis of waiver, under I.C. § 19-4908, is only appropriate where the court finds that the successive petition failed to include newly-asserted grounds for relief in the prior post-conviction proceeding without sufficient reason. I.C. § 19-4908; *Hernandez*, 133 Idaho 794. All grounds for relief available to a petitioner under the UCPA must be raised in a petitioner's original, supplemental, or amended petition. I.C. § 19-4908. The language of I.C. § 19-4908 prohibits successive petitions in those cases where the petitioner "knowingly, voluntarily and intelligently" waived the grounds for relief sought in the successive petition or offers "no sufficient reason" for omitting those grounds in the original petition. See *Palmer v. Dermitt*, 102 Idaho 591, 593 (1981). However, I.C. § 19-4908 allows a petitioner to raise a ground for relief, which was addressed in a former petition, if he or she can demonstrate sufficient reason why the claim was inadequately raised or presented in the initial post-conviction petition. See *Hernandez*, 133 Idaho at 798.

Petitioner asserted ineffective assistance of counsel in her initial petition; the Court does not find that she has asserted new grounds for relief in this petition. Therefore the issue is whether Petitioner

has demonstrated sufficient reason why her claims were inadequately raised or presented in the first petition.

In the current petition, Petitioner alleges that her previous post-conviction attorney, M. Lynn Dunlap, failed to verify the Amended Petition, failed to assert any specific facts to support her allegations that counsel gave ineffective assistance in the underlying criminal case, failed to assert facts which Petitioner asserts are true, and failed to adequately communicate with her regarding the facts and legal arguments contained in the original petition. Petitioner has not supported her claim with anything other than a copy of the Order Dismissing Petition for Post-Conviction Relief entered on August 26, 2008 and a copy of the original Amended Petition for Post-conviction Relief, filed by Mr. Dunlap on November 27, 2007. Notably, in the original amended petition, Mr. Dunlap attached fourteen exhibits in support of Petitioner's claims. The exhibits were letters she had written, including correspondence with the Idaho State Bar regarding a bar complaint she filed against Ms. Paul and Mr. Stoker, correspondence from Mr. Stoker regarding the status of his representation of her, and a letter to Judge Carlson expressing her concerns about counsel's representation of her. As previously stated, a claim for ineffective assistance of post-conviction counsel is not grounds for post-conviction relief; at most it may amount to a sufficient reason for courts to re-examine an original post-conviction petition for newly-asserted allegations or allegations inadequately raised. In sum, Petitioner has failed to demonstrate sufficient reason why her claims were inadequately raised or presented in the initial post-conviction petition. Significantly, Petitioner had two evidentiary hearings on her Motion to Withdraw Guilty Plea. Petitioner also appears to have had multiple opportunities to present admissible evidence that her counsel was ineffective under the UCPA. Therefore, summary dismissal of petitioner's successive petition on the basis of waiver is appropriate.

Amended Order, p. 4-6 (footnote omitted, emphasis added). (R. p. 124-126.)

Despite dismissing the petition on procedural grounds, the court went on to brief address Petitioner's assertion regarding counsel in the underlying criminal case:

The Petitioner claims counsel in her underlying criminal case, Randy Stoker and Marilyn Paul, failed to adequately investigate facts that petitioner has asserted as true. She alleges that there was either no investigation done in the underlying criminal case, or

that any information obtained by an investigator was not reviewed by original counsel and was thereby not reviewed by her.

Petitioner has not met her burden of showing prejudice. Petitioner essentially raised this same claim; that she was inadequately advised regarding evidence, in her original petition. In his Order Dismissing Petition for Post-Conviction Relief, entered August 26, 2008, Judge Daniel C. Hurlbutt stated the following:

Petitioner asserts, as she did in her motion to withdraw her guilty plea, that she was not presented with the state's evidence against her and that she therefore could not have entered a knowing, voluntary, and intelligent guilty plea. The district court, in considering her motion to withdraw her guilty plea, addressed the merits of this contention. Specifically, the court highlighted the fact that the petitioner was present at her preliminary hearing and heard the evidence presented by the state at that hearing. The court also noted that the defendant was present at all or nearly all of the hearings on the admissibility of evidence against her. The court, after hearing evidence on the motion, denied the motion.

While it is true that the Court of Appeals affirmed the denial on the grounds that the district court lacked jurisdiction to consider the motion in the first place, the fact remains that the record created by the proceedings on the motion to withdraw the guilty plea conclusively establishes that the defendant was aware of the evidence against her and entered a knowing, voluntary, and intelligent plea. Furthermore, the petitioner herself in her petition for post-conviction relief admitted that she did go over evidence with at least Ms. Paul. ... This combined with the facts established in the record directly rebut the petitioner's allegation that her guilty plea was not knowing, voluntary, and intelligent due to failure by counsel to inform the petitioner of the evidence against her. For that reason, the petitioner has failed to establish facts which would entitle her to relief.

*Order Dismissing*, pp. 4-5. Petitioner is required to show prejudice in asserting a claim of ineffective assistance of counsel, however, in her current petition, she states only that:

Had Stoker and Paul provided effective assistance as counsel to Petitioner, Petitioner would not have entered a guilty plea in this matter and would have proceeded successfully on a self defense or defense of others defense, after adequate investigation made on the underlying facts to support the facts as recited and contained herein.

The Court finds that Petitioner's recitation of facts followed by a conclusory statement that she would not have pled guilty had counsel performed an adequate investigation into the facts she put forth, amount to nothing more than conclusory allegations, previously raised and adjudicated and unsupported by admissible evidence, and conclusions of law, which this Court is not required to accept. It is therefore appropriate for this Court to summarily dismiss Petitioner's successive petition without an evidentiary hearing. This is especially true in light of the numerous opportunities petitioner has been afforded to bring forth admissible evidence to support her claims of ineffective assistance of trial counsel. Further, there is nothing in the evidence to support Petitioner's contention that her claims were inadequately raised in the initial post-conviction relief petition. Therefore, Petitioner's Successive Petition for Post Conviction Relief is hereby DISMISSED.

Amended Order, p. 7-8. (R. p. 127-128.)

C. The Court Erred in Summarily Denying the Petition

In short, the court erred because it dismissed the petition on different grounds than those raised in the notice of intent to dismiss or the state's answer. While the court dismissed the petition because Petitioner failed to establish a sufficient reason allowing the filing of a successive petition, the court's notice of intent to dismiss (and state's answer) complained only about the evidentiary insufficiency of the claims contained in the petition. In other words, the Petitioner was told only of factual insufficiency, not legal insufficiency.

The grounds for the court's intended summary dismissal are again as follows:

. . . . Notably, the petitioner's application is supported only by a nine-page statement of facts. This does not amount to admissible evidence sufficient to make a prima facie case as to each element of Petitioner's numerous claims. In fact, Petitioner appears to have listed an exceptionally wide array of claims, some of which she has asserted in prior petitions and motions, supported only by her description of the facts as she sees them.

Thus, Petitioner does not present adequate grounds upon which to base a successive application for post-conviction relief. Petitioner is hereby given twenty (20) days to reply to this proposed dismissal. I. C. § 19-4906(6).

Notice of Intent to Summarily Dismiss, p. 2 (footnote omitted). (R. p. 31.)

In response, the verified amended successive petition went to great lengths to provide Petitioner's statement as to the facts surrounding the crime, as well as discussed the facts of the representation of both trial counsel and initial post conviction counsel.

But in its Amended Order (and not its Notice of Intent to Dismiss), the court framed the issue as follows: "Therefore the issue is whether Petitioner has demonstrated sufficient reason why her claims were inadequately raised or presented in the first petition." And of course, following its discussion of the law related to successive petitions, the court held that sufficient reason had not been shown.

Nor was this ground for dismissal raised in the state's answer to the petition. While the state certainly complained that the pro se successive petition was factually insufficient, it never suggested that the problem was that it did not sufficiently describe the sufficient reason why the successive petition could be brought in the first place.

In its well established in Idaho that the Petitioner must receive notice of the grounds for the proposed dismissal and an opportunity to respond to any deficiencies of the petition. This principle has been discussed in many Idaho cases, and is succinctly summarized in *DeRushe v. State*, 146 Idaho 599 (2009):

The district court cannot dismiss claims on its own motion if it does not give the parties a twenty-day prior notice stating its reasons for doing so as required by Idaho Code § 19-4906(b). *Garza v. State*. Likewise, if the State moves to dismiss a petition under Idaho Code § 19-4906(c), the court cannot dismiss a claim on a ground not asserted by the State in its motion unless the court gives the twenty-day notice required by Section 19-4906(b). *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). A district judge also errs in dismissing a petition where the State does not allege any grounds for the dismissal, other than "Idaho Code §§ 19-4901 et seq." *Id.*

*Id.*, p. 602.

In our case, the Petitioner was never put on notice that the threshold issue was the legal question of whether she had demonstrated sufficient reason allowing the bringing of the successive petition. Thus, the summary dismissal on this basis was error and must be reversed and the matter remanded to the district court.

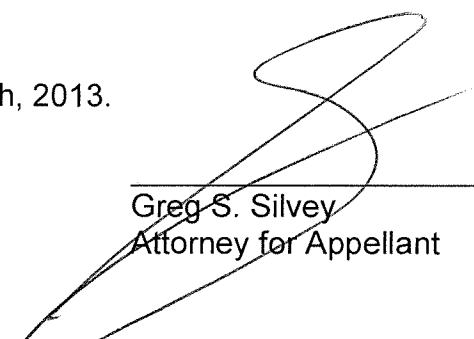
Further, the dismissal cannot be upheld on the alternative grounds where the court purports to address the merits. The court incorrectly equates the claim from her initial petition, to wit, that her attorneys failed to advise her of the evidence, with the claim in her instant petition, to wit, that her attorneys failed to investigate and so were unaware of the evidence. Further, the court fails to explain why Petitioner's lengthy statement of facts which it treated as verified would not be admissible evidence supporting her claim.

To summarize, the order of summary dismissal must be reversed since it relied on grounds different from those in the Notice of Intent to Dismiss or the state's answer. What's more, the dismissal cannot be upheld under the alternative merits ruling because it does not actually address the merits, and in any event, does not consider the Petitioner's evidence.

### CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's summary denial of the post conviction petition be reversed and that this matter be remanded for an evidentiary hearing.

DATED this 27 day of March, 2013.

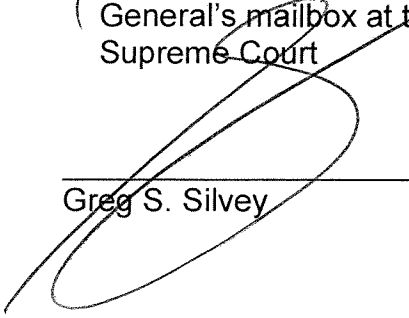
  
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Greg S. Silvey  
Attorney for Appellant

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27<sup>th</sup> day of March, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
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☐ U.S. Mail, postage prepaid  
☒ Hand Delivered to the Attorney  
General's mailbox at the  
Supreme Court

  
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Greg S. Silvey